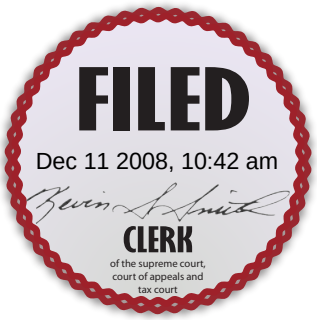

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IN THE
COURT OF APPEALS OF INDIANA

BRIAN A. MOUSER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A01-0803-CR-100
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Karen M. Love, Judge
Cause No. 32D03-0612-CM-743

December 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Brian Mouser appeals his conviction following a jury trial for operating a vehicle while intoxicated with an alcohol concentration equivalent to at least .08 gram but less than .15 gram of alcohol per 210 liters of breath, a Class C misdemeanor. On appeal, Mouser raises two issues which we restate as: 1) whether the trial court erred when it denied Mouser's motion for a continuance; and 2) whether the trial court erred when it refused Mouser's jury instruction regarding consideration of evidence of impairment. Finding no errors in the trial court's decisions, we affirm.

Facts and Procedural History

On December 12, 2006, Amber Carrera, the manager of a Taco Bell restaurant in Avon, Indiana, called 911 to report a drive-thru customer whom she believed to be intoxicated. A few minutes later, Hendricks County Sheriff's Deputy Scott Neville spotted Mouser's vehicle and began following and observing Mouser. After observing Mouser weaving and crossing the center lane on multiple occasions, Neville activated his overhead lights and stopped Mouser. As Neville spoke with Mouser in Mouser's vehicle, he noticed the odor of alcohol and that Mouser's eyes were glassy. Neville then administered three field sobriety tests, horizontal gaze nystagmus, walk-and-turn, and one-leg stand. Mouser failed all three tests. As a result, Neville read Mouser the implied consent law advisement and Mouser agreed to submit to a chemical test to determine his breath alcohol content ("BAC"). Neville transported Mouser to the Hendricks County jail and administered an alcohol concentration equivalency breath test using a B.A.C.

DataMaster instrument ("DataMaster"). The test revealed that Mouser's breath contained an alcohol concentration equivalent of .11 gram of alcohol per 210 liters of breath.

On December 20, 2006, the State charged Mouser with: Count I, operating a vehicle while intoxicated in a manner that endangers a person, a Class A misdemeanor; and Count II, operating a vehicle while intoxicated with a blood alcohol concentration equivalent to at least .08 gram but less than .15 gram of alcohol per 210 liters of breath, a Class C misdemeanor.[1] Prior to the first trial, Mouser had served a non-party request for production of documents on Dr. Peter Method, then-acting director of the State Department of Toxicology, seeking maintenance and training records, manuals, and other information related to the testing and use of the DataMaster. During the trial, Mouser sought unsuccessfully to admit the certified inspection and maintenance records. A jury found Mouser not guilty of Count I but guilty of Count II. Following the jury trial, Mouser filed a motion to correct error arguing that the trial court erred when it refused to admit the certified inspection and maintenance records relating to the DataMaster. The trial court granted Mouser's motion to correct error, vacated the conviction, and set the case for retrial on the Class C misdemeanor charge only.

Prior to the second trial, the trial court ordered the State to produce its final witness list by January 14, 2008. On that date, the State tendered its final witness list, which included Neville, Dr. Method and Tom Pierce, the State Department of Toxicology

[1] For purposes of brevity, we will refer to the crime charged in Count II as "operating with a BAC of at least .08."

inspector in charge of the DataMaster.[2] At a pre-trial conference on January 16, 2008, Mouser orally moved for a continuance or to exclude the testimony of Dr. Method and Pierce. The trial court denied both motions, but ordered the State to produce both witnesses for deposition. The trial court also informed both parties that it would exclude the testimony of any witness who did not appear for deposition prior to trial. On January 17, 2008, Mouser served notice of his intention to take the depositions of Dr. Method and Pierce on January 18, 2008, at his counsel's law office. Mouser also filed emergency motions for a continuance and to compel discovery on January 17. The trial court denied the motion for a continuance and ordered the State to provide a summary of testimony in accordance with Indiana Trial Rule 26(B)(4) for any expert witnesses it planned to call at trial. Although Mouser was able to take the deposition of Pierce, Dr. Method neither appeared for his deposition[3] nor testified at the second trial. On the first day of trial, Mouser orally moved the trial court once again for a continuance or, in the alternative, to exclude all testimony of Dr. Method and any evidence derived therefrom. The trial court denied the motion to continue, but ordered that Dr. Method would be excluded from testifying at the trial. Pierce testified at trial and was cross-examined by Mouser.

On January 24, 2008, following a two-day jury trial, a jury found Mouser guilty of operating with a BAC of at least .08. The trial court then sentenced Mouser to 60 days at the Hendricks County Jail with 58 days suspended and 363 days of probation. Mouser now appeals.

[2] The State's final witness list for the first trial had included only Neville, and the State called Neville as its only witness at trial. However, preliminary witness lists had indicated the possibility of calling a representative from the State Department of Toxicology.

[3] Dr. Method or his staff had repeatedly informed Mouser's counsel that he was unavailable for deposition or live testimony due to a conflicting trial in another county and a mandatory staff meeting.

Discussion and Decision

I. Denial of Motion to Continue

Mouser first argues that the trial court erred when it denied his motion to continue the trial. Mouser does not argue that he based his motion for continuance on a reason identified in Indiana Code section 35-36-7-1; therefore, we review the trial court's decision to deny Mouser's motion for an abuse of discretion. See Wells v. State, 848 N.E.2d 1133, 1143 (Ind. Ct. App. 2006), corrected on reh'g, 853 N.E.2d 143, trans. denied, cert. denied, 127 S.Ct. 1913 (2007). A trial court abuses its discretion only when the decision is "clearly against the logic and effect of the facts and circumstances before the court." Id. In addition, we will not conclude that a trial court abused its discretion unless the defendant can demonstrate prejudice as a result of the denial of his motion to continue. Dorton v. State, 419 N.E.2d 1289, 1295 (Ind. 1981).

Mouser filed his various motions to continue the trial so that he could obtain the deposition of Dr. Method or, in the alternative, so that Dr. Method could be compelled to testify at trial. Mouser argues that Dr. Method's testimony is essential to challenge the credibility of the DataMaster and the breath test results.

The director of the State Department of Toxicology certifies that the breath test instruments used throughout the state have been inspected and found to be in working order at least once every 180 days and that breath test operators have been trained at least once every two years. See Ind. Code § 9-30-6-5; 260 Ind. Admin. Code 1.1-1-3 and -2-2. Certified copies of the above certifications are admissible in a criminal trial for operating a vehicle while intoxicated and constitute prima facie evidence that the equipment was in

proper working condition on the date of the test and that the breath test operator was certified to conduct the test. Ind. Code § 9-30-6-5(c). However, results of breath tests are not admissible if the test operator, test equipment, chemicals used in the test, or techniques used in the test have not been certified according to the rules set up by the director. Id. § 9-30-6-5(d).

Mouser argues that his inability to examine Dr. Method regarding certification of the DataMaster instrument and whether certain regulations were followed with respect to simulators used in testing the instrument violates his constitutional right to confrontation. With regard to the certifications issued by Dr. Method, this court has previously considered this argument and found that evidence of instrument certification and operator certification is not testimonial in nature and thus does not violate the confrontation clause. See Napier v. State, 827 N.E.2d 565, 568-70 (Ind. Ct. App. 2005). It would be unreasonable to require the director of the State Department of Toxicology to be present in every court on a daily basis offering testimony about his certification of breath test instruments and operators. Id. at 569. In addition, Mouser did have the opportunity to depose and cross-examine Pierce, the inspector who actually tested and calibrated the breath test equipment. Therefore, Mouser was not prejudiced by his inability to depose or examine Dr. Method with respect to his certification of the breath test instruments and operators.

Second, Mouser argues that he wished to question Dr. Method regarding whether the department followed its own regulations regarding testing of simulators used in inspecting and calibrating the breath test instruments. The provision of Indiana Code

section 9-30-6-5 that renders a breath test result inadmissible if the chemicals used in the test have not been approved according to the rules and regulations adopted by the director does not apply to simulator solutions used to test the instrument. State v. Rumple, 723 N.E.2d 941, 945 (Ind. Ct. App. 2000). Rather, the statute refers to chemicals used in breath test instruments that require a chemical sample for comparison during the breath test itself. Id. The DataMaster used here does not require a chemical sample for testing; the simulator solutions are only used for the inspection and calibration of the instrument. As a result, any line of questioning regarding the testing of simulators would have been irrelevant to the issue of the admissibility of the test results. In addition, Mouser cross-examined Pierce at length on this issue and thus was able to put the question of the reliability of the breath test before the jury. Therefore, Mouser was not prejudiced by his inability to depose or examine Dr. Method with respect to the testing of simulators.

Finally, Mouser argues that he wished to question Dr. Method regarding the three-hour statutory presumption of the validity of a breath test created by Indiana Code section 9-30-6-15. This statute creates a rebuttable presumption that a person whose breath test result, taken within three hours of operating a vehicle, establishes a BAC of at least .08, had a BAC of at least .08 at the time he operated the vehicle. Ind. Code §§ 9-30-6-2 and -15. Mouser argues that Dr. Method had previously made statements calling into question whether a rational basis existed to believe that a person's BAC at the time of operating a vehicle would be the same as it would be at a later time when the breath test was administered. Mouser failed to create a record of any actual previous statements by Dr. Method, however. In Disbro v. State, the defendant made a similar argument and

presented the testimony of the State's toxicologist that there was "no logical or scientific basis to assume that a person's breath alcohol will likely remain the same even one hour after a traffic stop took place."[4] 791 N.E.2d 774, 777 (Ind. Ct. App. 2003). Despite this testimony, this court held that there is a rational connection between the blood alcohol content level at the time of the breath test and the blood alcohol content level at the time of the offense. Id. at 778. Additionally, although Mouser could not obtain the testimony of Dr. Method, he could have retained his own expert witness to present similar testimony. Therefore, Mouser was not prejudiced by his inability to depose or examine Dr. Method with respect to the issue of the three-hour presumption.

The trial court issued an appropriate sanction for the State's inability to produce Dr. Method for deposition when it prohibited the testimony of Dr. Method at trial. Although Mouser argues that the trial court should also have prohibited the evidence of the breath test results, his argument fails. Indiana Code section 9-30-6-5 specifically authorizes the admission of certified copies of certifications for breath test instruments and operators and the live testimony of Dr. Method was not required for their admission. See Napier, 827 N.E.2d at 569. In addition, the State did produce Pierce for deposition and Mouser cross-examined Pierce at trial. Mouser has failed to demonstrate that the trial court's denial of his motion to continue the trial prejudiced him, and, therefore, we find no error.

II. Refusal to Give Jury Instruction

Mouser next argues that the trial court erred when it refused to give his tendered jury instruction regarding consideration of evidence of impairment. Giving jury

[4] The opinion in Disbro does not indicate whether the toxicologist who gave the testimony was Dr. Method.

instructions is a matter within the sound discretion of the trial court, and we review a refusal to give a tendered instruction for an abuse of that discretion. Creager v. State, 737 N.E.2d 771, 776 (Ind. Ct. App. 2000). We will reverse a trial court's failure to give a tendered instruction if: 1) the instruction correctly states the law; 2) the evidence supports the instruction; 3) the instruction does not repeat material adequately covered by other instructions; and 4) the substantial rights of the tendering party would be prejudiced by failure to give it. Id.

Mouser tendered the following final jury instruction, which the trial court refused to give:

> Testimony relating to observations of a person and that person's performance on Field Sobriety Checks or Skills is only circumstantial evidence and in this case is not evidence of that person's intoxication.
>
> These observations and Field Sobriety Tests are to be considered solely for the purpose of offering the certified breath test. These observations and Field Sobriety Tests are not relevant or direct evidence of the defendant's BAC, nor are they to be considered for such purpose.
>
> The defendant in this case was not intoxicated or impaired at the time he was operating a vehicle.[5]

Appellant's Appendix at 311. As support for his instruction, Mouser cited only a federal case from the District of Maryland. Mouser argues that, in finding him not guilty of operating a vehicle while intoxicated in a manner endangering a person, the jury found that he was not impaired or intoxicated at the time he was operating the vehicle. Therefore, any evidence submitted that he was impaired by alcohol or demonstrated intoxication would not be relevant to whether his breath contained a BAC of at least .08 and would unfairly prejudice the jury. Initially, we point out that there is no logical basis,

[5] Mouser tendered this amended instruction prior to the second trial. This instruction modified that last line of his original tendered instruction for the second trial, which read, "The defendant in this case **has been found to be** not intoxicated or impaired at the time he was operating the vehicle." Appellant's App. at 279 (emphasis added).

and Mouser has presented no authority, for the proposition that in finding him not guilty of operating a vehicle while intoxicated in a manner that endangers a person, the jury necessarily found that he was not impaired or intoxicated. On that basis alone, the instruction may misstate the law and certainly would confuse the jury. Additionally, the evidence submitted in the case does not support an instruction that Mouser was not impaired or intoxicated at the time he was operating his vehicle.

Secondly, we disagree with Mouser that evidence of impairment, though not necessary to support a conviction of operating with a BAC of at least .08, has no relevance to such a charge. In Disbro, the State charged the defendant with the exact same crimes as Mouser faced, operating while intoxicated in a manner that endangers a person, and operating with a BAC of at least .08 gram. 791 N.E.2d at 776. A jury found the defendant not guilty of the first count but guilty of the second count. Id. On appeal, this court held the State introduced sufficient evidence that the defendant's BAC was .11 at the time he operated his vehicle noting that, in addition to his breath test results, Disbro was speeding; changed lanes without signaling; made a right hand turn without signaling; smelled of alcohol; had red, watery eyes; slurred his speech; and failed several field sobriety tests. Id. at 779. Thus, this court considered the evidence of impairment relevant to the charge of operating with a BAC of at least .08.

Further, the presumption created by Indiana Code section 9-30-6-15 is not only rebuttable, but also permissive – in other words, the jury is free to accept the presumption or not. Thompson v. State, 646 N.E.2d 687, 692 (Ind. Ct. App. 1995). Given the possibilities that Mouser would present evidence to rebut the presumption or that the jury

might choose to reject it, other evidence of Mouser's impairment and intoxication, such as his driving behavior, his appearance, the odor of alcohol emanating from him, and his failure of the field sobriety tests is certainly relevant to the jury's determination of guilt. Mouser's tendered instruction does not correctly state the law nor is it supported by the evidence. Therefore, the trial court did not err in refusing to give it.

Conclusion

The trial court did not err in denying Mouser's motion to continue the trial or in refusing to give his tendered jury instruction.

Affirmed.

NAJAM, J., and MAY, J., concur.